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COUNTY OF ERIE

MARK C. POLONCARZ

COUNTY EXECUTIVE

June 11, 2013

Honorable Thomas Mazur, Chair
Government Affairs Committee
Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Re: Resolution - Investigating the Careless Release of Confidential Information by the
Department of Social Services

Dear Legislator Mazur:

I hereby provide a Report in response to the introduction of a Resolution by Legislators Lynne Dixon, John Mills, Kevin Hardwick, Edward Rath and Joseph Lorigo bearing the above caption. The responses described in this Report were undertaken by a number of departments including Social Services, Purchase, Law, Public Works, Budget, and staff members from the County Executive's office. In addition, outside counsel was consulted during the development of the responses.

The Report commences with events that occurred on April 17, 2009. Its last entry relates to events on June 7, 2013. The Report includes a "Timeline of Events and Related Attachments". The time line has 39 descriptive entries and includes 24 attachments under 22 tabs, which document and support the statements made in the Report.

The following are key findings:

1. Erie County has had a contract for the secure disposal of confidential documents at least since 2009. The contract currently in effect was extended in December 2011 by the outgoing Collins Administration and will lapse in April 2015.
2. In May 2012 the County Attorney engaged the Magavern, Magavern & Grimm law firm to help the County conduct a risk assessment and to develop a plan to meet all current standards for the protection of confidential records, particularly focusing upon HIPPA compliance. This effort is nearing its final stage.
3. Locked recycling totes were always available in the Rath Building, and were constantly in use by departments; however, at some point unlocked totes were delivered to some departments and floors in place of the locked totes that were called for. At other times, locked totes were properly delivered. It appears that when locked totes were not available

employees improperly placed confidential information in the unlocked totes that were at their work locations. When locked totes were available they were used. Locked and unlocked totes were taken to the sub-basement and collected by Cascade Recovery.

4. Other than with regard to the records taken by the Comptroller, there is no evidence that any records were improperly disclosed from the totes to any unauthorized persons.
5. Although no records are known to have been disclosed, there was an unacceptable risk that a records disclosure could take place and there was a need to improve the system to better protect confidential records.
6. As soon as the Administration was made aware of the problem on April 1, 2013, it took immediate actions to secure the totes, to analyze the problems and take steps to improve the systems on a long term basis.
7. On May 29, 2013 Erie County notified the United States Department of Health and Human Services of a risk of disclosure of HIPPA protected records. This notification was within the 60 day time period from discovery of a risk of disclosure, which occurred on April 1, 2013, to the notification.
8. Erie County notified several New York State agencies of the risk that some confidential records could have been disclosed, of the Administration's investigation and the actions that have been taken.
9. There is no evidence to support the Comptroller's claim that the Legislature and through the Legislature, the Administration was notified of a confidential records problem in October 2012. It appears that the Comptroller's assertion is related to comments made by one or more DSS employee who were seeking pay raises in the fall of 2012. A careful review of available information indicates that the Legislature was not advised of a problem with confidential records during the fall of 2012. The Comptroller's unsupported claim has placed the County in jeopardy of incurring a significant fine for failure to self-report within the 60 days specified by law. Despite the Comptroller's statements to the press, no evidence has been found to support the claim that a problem with confidential records was presented to the Legislature or the Administration in the fall of 2012 that would require a notification.
10. It appears that the Comptroller was advised (incorrectly we now believe) by DSS employees on Friday, May 24, 2013 or Saturday, May 25, 2013 that there had been notice to the Legislature of a confidential records problem in October 2012. Rather than conduct an investigation to substantiate or refute the allegations, the Comptroller notified the press of the unfiltered statement of one or more employee who was dissatisfied because they had not received a raise earlier in the year. The Comptroller's allegations appeared in the Buffalo News on Monday May 27, 2013. It has been relatively simple to determine that no such public notice to the Legislature or Administration of problems with confidential records ever occurred. The Comptroller's decision to immediately make a public statement without any due diligence or the skeptical mindset that should be one of the hallmarks of a Comptroller could seriously jeopardize the County.
11. In his May 17, 2013 letter, the Comptroller for the first time notified the Administration of a problem with confidential records. This was at least six weeks after he claims to have discovered a problem with confidential records. That notification was not initiated by the Comptroller, but rather was in response to my letter of May 8, 2013 asking if he had obtained confidential information. The Comptroller has not provided an explanation for this delay.
12. The Comptroller has taken and failed to return as requested, confidential information that he claims to have in his possession. Obtaining this information and storing it in a location

other than as specified in the Confidentiality and Non-Disclosure Agreements signed by his office is a breach of these agreements.

13. The Comptroller has yet to issue any official audit, draft audit, interim audit memorandum, audit alert, or any other document with regard to the protection of confidential information. He has however made numerous statements on social media, on his website and to the press.

The enclosed Report is current as of today. We believe all immediate risks have been addressed. We are still, however, collecting information that will allow a determination to be made if more long term improvements should occur. We must also complete the work now underway through the Magavern firm to come fully into compliance on a county-wide basis.

I would also offer one final comment. We have not found a system-wide breakdown, and we have not found actual disclosures of confidential information from the totes except to the Comptroller. When we became aware of the situation we took immediate action to correct those items most in need, have corrected or will correct other weaknesses that we found and will make further improvements beyond the system as it existed in 2009. We do not believe there is any reason for the District Attorney or any other outside agency to conduct an investigation as called for in the Resolution.

I hope that this information will be helpful to the Legislature and the Government Affairs Committee as you examine this matter.

Sincerely yours,



Richard Tobe
Deputy County Executive

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cc: County Executive Mark Poloncarz
County Attorney
County Comptroller
Erie County Legislature
Erie County Fiscal Stability Authority